

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
HELENA DIVISION

UNITED STATES OF AMERICA,

Plaintiff/Respondent,

vs.

JEREMY JAMES RUMMEL,

Defendant/Movant.

Cause No. CR 18-15-H-SEH  
CV 21-13-H-SEH

ORDER

Defendant/Movant Jeremy James Rummel, a federal prisoner proceeding pro se, has moved to vacate, set aside, or correct his sentence.<sup>1</sup> The motion will be liberally construed.<sup>2</sup>

Rummel asserts ineffective assistance of counsel. Facts sufficient to support an inference (1) that counsel's performance fell below an objective standard of reasonableness, and (2) that there is "a reasonable probability that, but for

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<sup>1</sup> See 28 U.S.C. § 2255(a).

<sup>2</sup> See *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam); *Rishor v. Ferguson*, 822 F.3d 482, 495 (9th Cir. 2016).

counsel's unprofessional errors, the result of the proceeding would have been different"<sup>3</sup> must be alleged to warrant further proceedings.

Rummel was designated a career offender<sup>4</sup> under the Sentencing Guidelines. The designation applied because he had two prior felony convictions for a "controlled substance offense."<sup>5</sup> Courts employ a categorical approach, looking only to the elements of the statute underlying the conviction, not to the facts of the offense to determine whether a prior conviction counts as a controlled substance offense under the Guidelines.<sup>6</sup>

Counsel argued that a federal conviction for conspiracy to manufacture methamphetamine was not a controlled substance offense. In fact it is.<sup>7</sup>

Rummel was also convicted of criminal distribution of dangerous drugs,

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<sup>3</sup> See *Strickland v. Washington*, 466 U.S. 668, 687–88, 694 (1984).

<sup>4</sup> See U.S.S.G. §§ 4B1.1, 1.2 (Nov. 1, 2018); Presentence Report ¶¶ 28, 45–46, 50.

<sup>5</sup> See U.S.S.G. § 4B1.2(b) & cmt. n.1.

<sup>6</sup> See *United States v. Simmons*, 782 F.3d 510, 513 (9th Cir. 2015); *United States v. Lee*, 704 F.3d 785, 788 (9th Cir. 2012).

<sup>7</sup> See 21 U.S.C. §§ 846, 841(a); Order (Doc. 148) at 2–3.

oxycodone,<sup>8</sup> in violation of Mont. Code Ann. § 45-9-101(1) in 2009.<sup>9</sup> A controlled substance offense categorically includes solicitation.<sup>10</sup>

Counsel's assistance was neither unreasonable nor prejudicial. Reasonable jurists may disagree about the method or outcome of categorical analysis, but all would agree that counsel's performance was reasonable under case law at the time of Rummel's sentencing.

A certificate of appealability<sup>11</sup> is unwarranted.

ORDERED:

1. Rummel's motion to vacate, set aside, or correct the sentence under 28 U.S.C. § 2255<sup>12</sup> is DENIED.
2. A certificate of appealability is DENIED. The clerk shall immediately process the appeal if Rummel files a Notice of Appeal.

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<sup>8</sup> See Doc. 149-1 at 5–6, 20–21; see also *Ragasa v. Holder*, 752 F.3d 1173, 1176 (9th Cir. 2014); *Coronado v. Holder*, 759 F.3d 977, 983–85 (9th Cir. 2014) (following *Descamps v. United States*, 570 U.S. 254, 263–64 & n.2 (2013)). The focus remains on elements, not conduct.

<sup>9</sup> See Am. Presentence Report ¶ 46.

<sup>10</sup> See Mont. Crim. Jury Instr. No. 9-101; Mont. Code Ann. §§ 45-9-101(2), 50-32-101(6), (20), 50-32-224(1)(a)(xv) (2009) (now (xvi)); see also 21 U.S.C. § 812(c); 21 C.F.R. § 1308.12(b)(1)(xiv) (Oct. 30, 2020); 39 Fed. Reg. 22140, 22142 (June 20, 1974) (classifying oxycodone as Schedule II controlled substance).

<sup>11</sup> See 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

<sup>12</sup> Doc. 146.

3. The clerk shall ensure that all pending motions in this case and in CV 21-13-H-SEH are terminated and shall close the civil file by entering judgment in favor of the United States and against Rummel.

DATED this 19~~14~~ day of May, 2021.

  
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Sam E. Haddon  
United States District Court